

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 21, 2009

**STATE OF TENNESSEE v. JAMES E. DAVIDSON**

**Appeal from the Circuit Court for Montgomery County**  
**Nos. 40701234, 40701491, 40701492     Michael R. Jones, Judge**

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**No. M2009-00384-CCA-R3-CD - Filed February 11, 2010**

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The Defendant, James E. Davidson, appeals from the sentencing decision of the Montgomery County Circuit Court. In addition to pleading guilty to numerous other sexual offenses, the Defendant entered “open pleas” to two counts of rape of a child. Following a sentencing hearing, the trial court imposed consecutive terms of twenty years for these two child rape convictions. On appeal, the Defendant argues that the imposition of consecutive sentences was improper. After review, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, James E. Davidson.

Robert E. Cooper, Jr., Attorney General and Reporter; Clark B. Thornton, Assistant Attorney General; John W. Carney, District Attorney General; and Helen Young, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

In October 2007, a Montgomery County grand jury returned an eight-count indictment against the Defendant, Case No. 40701234, charging him with two counts of rape of a child, two counts of aggravated sexual battery, two counts of rape, and two counts of sexual battery

by an authority figure. This indictment involved one victim, A.S.,<sup>1</sup> and the events were said to have occurred between February 18, 2006, and February 17, 2007.

Two additional indictments were returned against the Defendant in November 2007. In Case No. 40701491, the Defendant was charged with sexual battery by an authority figure of another victim, A.M, during the months of April or May 2007. The second indictment, Case No. 40701492, was a fifteen-count indictment, wherein it was alleged that the Defendant committed eight counts of rape of a child, three counts of aggravated sexual battery, and four counts of exploitation of a minor. This indictment involved a third victim, K.B., and the events were alleged to have occurred sometime in the fall of 2006 through July 2007.

On August 25, 2008, he entered pleas in all three cases. In Case No. 40701234, the Defendant pleaded guilty to two counts of child rape, two counts of aggravated sexual battery, one count of rape, and one count of sexual battery by an authority figure. One count of rape and one count of sexual battery by an authority figure were dismissed. His plea to Count 1, rape of a child, was an “open plea” and, pursuant to the terms of the agreement, he received an effective fifteen-year sentence for his remaining five convictions. This fifteen-year sentence was to be served concurrently with the sentence imposed on the “open plea.” In Case No. 40701491, he pleaded guilty as charged to sexual battery by an authority figure and received a three-year sentence to be served concurrently with Case No. 40701492. Finally, in Case No. 40701492, the Defendant again entered an “open plea” to one count of rape of child and also pleaded guilty to five additional counts of rape of a child and five counts of aggravated sexual battery. The four counts of sexual exploitation of a minor were dismissed. Again, he received an effective fifteen-year sentence for his remaining convictions, which sentence was to be served concurrently with the sentence imposed on the “open plea.” The end result of the three plea agreements was that the trial court was to determine the length of the two “open pleas” to child rape and whether these two sentences should be served concurrently with or consecutively to one another. It was also stipulated that all of the offenses in the three cases occurred before July 1, 2007.<sup>2</sup>

The Defendant has not included a copy of the transcript of the guilty plea hearing in the record on appeal. We glean the following facts surrounding these two child rapes from the presentence report. In Case No. 40701234, the then thirteen-year-old victim, A.S., stated as follows:

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<sup>1</sup> It is the policy of this Court to refer to a minor victim of sexual abuse by his or her initials.

<sup>2</sup> This makes Tennessee Code Annotated section 39-13-523, Service of Sentence as a Child Sexual Predator, inapplicable.

[S]he was at her grandparents' house and went into the Defendant's room where he was playing video games. The Defendant . . . is [the victim's] uncle.

[The victim] stated that she layed across a double bed to watch [the D]efendant play video games. She stated she fell asleep and when she woke up [the D]efendant was rubbing her all over. [The victim] stated he rubbed her genitals and made her rub his, she stated he laid on top of her and made a comment he needed a condom. [The victim] stated that at this point she got up and ran to the bathroom.

[The D]efendant admitted that he performed oral sex on [the victim], that he digitally penetrated her and sucked on her nipples.

In Case No. 40701492, the Defendant confessed to rubbing his penis against nine-year-old K.B.'s vagina, kissing her, performing oral sex on her, and sucking her nipples. He further admitted to watching adult movies with her. No facts were provided in Case No. 40701491.

A sentencing hearing was January 7, 2009. The State moved the presentence report, containing a victim impact statement, into evidence. The Defendant did not present any proof. At the conclusion of the hearing, the trial court imposed sentences of twenty years for each child rape conviction and ordered that the sentences were to be served consecutively to one another, resulting in an effective sentence of forty years at 100%. It is from this sentencing determination that the Defendant now appeals.

### **Analysis**

In this appeal, the Defendant challenges only the imposition of consecutive sentencing. On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

Tennessee Code Annotated section 40-35-115(b) provides that a trial court may, in its discretion, order sentences to run consecutively if it finds any one of the following criteria by a preponderance of the evidence:

(1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;

(2) The defendant is an offender whose record of criminal activity is extensive;

(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). These criteria are stated in the alternative; therefore, only one need exist to support the appropriateness of consecutive sentencing.

In addition to these criteria, consecutive sentencing is also subject to the general sentencing principles that the overall sentence imposed “should be no greater than that deserved for the offense committed,” that it “should be the least severe measure necessary to achieve the purposes for which the sentence is imposed,” and that the defendant’s “potential for rehabilitation” be considered. Tenn. Code Ann. § 40-35-103(2), (4) and (5). Additionally, we are advised that “the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.” Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

First, we note that failure to include the transcript of the guilty plea hearing in the record prohibits this Court from conducting a full de novo review of the sentence under Tennessee Code Annotated section 40-35-210(b). Moreover, it is clear from the sentencing transcript that the trial court did consider the facts and circumstances of the offenses in determining the Defendant’s sentence. In any event, the presentence report provided us with some of the facts and circumstances surrounding the offenses, as have been previously set forth herein.

Moreover, the record in this case supports the trial court’s findings relative to ordering that the sentences be served consecutively. Those findings are as follows:

Number two is the defendant is an offender whose record of criminal activity is extensive. One, two, three, four, five, six, seven, eight—there’s 11 class B felonies or class A felonies in the 1492 case and I believe six in the 1234 case. He certainly has a record of criminal activity that is very extensive. Those are matters of public record.

. . . Number five is the defendant is convicted of two or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of the defendant’s undetected sexual activity, the nature and scope of the sexual activities, and the extent of the residual, physical, or mental damage to the victim or victims.

All of those factors apply in this case in that there was a definite long time span between the first time these occurred and the reporting; the nature

and scope of the sexual activity was very extensive, I don't know what you would call it; based on the presentence report or victim impact statement there is residual mental damage to at least one of these victims.

The Defendant makes no real argument that these criteria do not apply; he simply contends concurrent sentencing is "adequate punishment." The record supports the imposition of consecutive sentencing under either criteria found by the trial court. Although the Defendant had no record prior to these three indictments, the Defendant pleaded guilty to sixteen sexual offenses, in addition to the two sentences for which he was being sentenced. These crimes involved three different minors and occurred over a long period a time. The Defendant was A.S.'s uncle. The trial court properly relied on the presentence report and victim impact statement in concluding that one of the victims suffered mental damage from the abuse. The trial court considered the aggravating circumstances surrounding the Defendant's conduct.

The trial court considered the principles of sentencing, as well as all relevant facts and circumstances. We conclude that the evidence contained in the record supports the trial court's finding as the proof established that the aggregate sentence imposed is justly deserved and no greater than that deserved for the offenses committed. The trial court did not abuse its discretion in imposing consecutive sentences.

### **CONCLUSION**

We conclude that the trial court did not err in its sentencing determination. The judgments are affirmed.

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DAVID H. WELLES, JUDGE